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IN THE

SUPREME COURT
OF THE
UNITED STATES.

October Term, 1936
No. 121

PIERCE LONERGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

PIERCE LONERGAN,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Your petitioner respectfully shows:

I.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

A.

History of the Case.

Petitioner and one John R. Walsh were indicted for mail fraud under Section 215 of the Criminal Code (18 U. S. C. A. Sec. 338) [R. 2, *et seq*]. The indictment

was originally in ten counts, but three of them were dismissed at the close of the government's case [R. 322]. Petitioner was tried separately [R. 27], and convicted by a jury on the remaining seven counts. Motion for new trial was denied May 28, 1936, and petitioner was sentenced to three years' imprisonment in a Federal penitentiary on each count, sentences to run concurrently [R. 33]. On appeal to the Circuit Court of Appeals for the Ninth Circuit [R. 35] the Court affirmed the conviction on March 5, 1937 [R. 614], and denied a rehearing on May 10, 1937 [R. 624].

The charging in the several counts of the indictment, except in names of the parties affected, is:

> "That Pierce Lonergan and John R. Walsh * * * devised and intended to devise a scheme and artifice to defraud and for obtaining money and property by means of false and fraudulent pretenses, representations and promises from" (certain named persons) * * * "and * * * for the purpose of executing the said scheme and artifice and attempting so to do * * * did knowingly, wilfully, unlawfully and feloniously place and cause to be placed in the United States Post Office at Seattle" certain letters.

A copy of the material parts of the indictment appear in connection with the opinion of the Circuit Court now reported in 88 Fed. (2d) 591, at pages 592 and 593.

B.

Facts Involved.

Upon the trial, despite objections of petitioner, much evidence, both oral and documentary, was continually admitted upon the theory, as charged in the indictment among other things, that petitioner had "engaged in the silver brokerage business at Seattle" under four several firm names, and in the course of such business, through such firms and their agents and salesmen, he had made false and fraudulent representations to "investors," and had also taken steps "fraudulently to depress the price of silver on said Seattle Market." The rulings of the trial court in the above matters were made the subject matter of assignments of error upon the appeal [R. 550, 566-571]. In one particular instance, a letter dated August 17, 1934, was offered. It was identified by the writer, Joseph Gandy, member of a prominent Seattle law firm, as the copy of a letter written to the defendant, on behalf of a client, Atwood [R. 262]. This witness stated that he had sent a copy of this to Louis Martin Co. [R. 263], which had dealt with Atwood, and which was one of the four firms charged to have been operated by petitioner. This letter became Exhibit 75 [R. 267], and is set out as a Supplement hereto, page I. When first offered, petitioner's objections were amplified by the Court itself. In so many words, the Court then stated that the instrument was "self-serving," and "after the event" [R. 264]. And denied it admission. Thereupon, over objection, the Government introduced two other letters, Exhibits 76-A [R. 265] and 76-B [R. 266], copies of which also appear in the Supplement hereto, pages III and IV. Neither was written by petitioner. Neither refers to Exhibit 75.

And 76-B, in terms, refers to and was identified as a reply to another letter entirely [R. 261]. Exhibit 75 was then admitted [R. 267].

In part, that exhibit recites:

> "The allegations and persuasions made by Mr. Pierce Lonergan * * * to Mr. Atwood were obviously fraudulently made and were made solely with the intent to get Mr. Atwood out of the market * * * You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan * * * he will seek legal redress, if necessary, to recover his damages sustained by reason of such fraudulent misrepresentations" [R. 533-534].

Motions were made to strike this exhibit; and to instruct the jury to disregard it; but they were denied [R. 267].

There was continually introduced throughout the trial over defense objections, hearsay testimony, highly prejudicial, of the type of that of the witnesses McFaddin [R. 184], McGrew [R. 210], and Romer [R. 211].

Regarding the assignments based on all of the errors above mentioned, the Circuit Court in its opinion held:

> "28 assignments (numbered 5, 9 to 25, inclusive, and 31 to 40, inclusive) are to the admission of and refusal to strike out evidence. The assignments do not indicate that any of this evidence was objected to in the trial court. They do not state what objections, if any, were made, nor the grounds thereof, nor the grounds, if any, on which appellant moved to strike out the evidence. Such assignments do not conform to our rule 11 and will not be considered. Cody v. United States (C. C. A. 9), 73 Fed. (2d) 180, 184; Goldstein v. United States (C. C. A. 9), 73 Fed. (2d) 804, 806." [R. 619.]

II.

REASONS FOR ALLOWANCE OF THE WRIT.

1. In a criminal case, where the petitioner had been convicted of a felony and sentenced accordingly, it was error for the Circuit Court of Appeals to refuse to consider "plain error," regardless of any rules of court, and the decision of the court is in probable conflict with the decision of this Court in *Shepard v. United States,* 290 U. S. 96, 103, 78 L. ed. 196; *Williams v. Great Southern Lumber Co.,* 277 U. S. 19, 72 L. ed. 761; *United States v. River Rouge Imp. Co.,* 269 U. S. 411, 421, 70 L. ed. 339, 346; *Brasfield v. United States,* 272 U. S. 448, 450, 71 L. ed. 345, and related cases, as well as with its own decisions in *Paddock v. United States,* 79 Fed. (2d) 872, 874, and related cases; justifying and requiring the exercise of the supervisory powers of this Court.

2. In such a case, the decision of the Circuit Court in sanctioning the admission in evidence by the trial court of self-serving declarations, opinion evidence going precisely to the very basis of the crime charged, to-wit, fraud, violates the constitutional rights of the petitioner under the Fifth and Sixth Amendments to the Constitution, by denying him a fair and impartial trial by due process of law in accordance with established procedure, and decides a federal question in conflict with applicable decisions of this Court, particularly *Shepard v. United States,* 290 U. S. 96, 103, 78 L. ed. 196, 201; *Brasfield v. United States,* 272 U. S. 448, 450, 71 L. ed. 345, 346; *New York Central Railroad Co. v. Johnson,* 279 U. S. 310, 318-319, 73 L. ed. 706, 710-711; and related cases.

3. In such a case, it was error for the Circuit Court to refuse to consider assignments of error based on the

admission of hearsay evidence (Nos. XXI, XXXI and XXXII) for the stated reason that such assignments were not in proper form to require consideration under former Rule 11 of that court, and the decision is probably in conflict with that court's former decision in *Meehan v United States,* 70 Fed. (2d) 857, 858, 859; justifying and requiring the exercise of the supervisory powers of this Court.

Wherefore, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Ninth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of the said Circuit Court had in the case numbered and entitled "No. 8218, Pierce Lonergan, Appellant, v. United States of America, Respondent," to the end that this cause may be reviewed and determined by this Court as provided for by the statutes of the United States, and that the judgment herein of the said Circuit Court of Appeals for the Ninth Circuit be reversed by this Court, and for such further relief as to this Court may seem proper.

Dated June 5, 1937.

PIERCE LONERGAN,
Petitioner.

IN THE

SUPREME COURT

OF THE

UNITED STATES.

October Term, 1936

No.....

PIERCE LONERGAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT.

I.

Opinion Below.

The opinion of the United States Circuit Court of Appeals for the Ninth Circuit was rendered, entered and filed on March 5, 1937, and is reported in Advance Sheets No. 3, April 26, 1937; Volume 88, Federal Reporter (2nd Series) page 591, et seq. The judgment of the United States District Court was not reported.

II.

Jurisdiction.

(1) The judgment to be reviewed was entered March 5, 1937 [R. 623]. A petition for rehearing, duly filed, was denied May 10, 1937 [R. 624]. The time to apply for a writ of certiorari, therefore, runs from May 10, 1937. The petition for certiorari was filed herewith on or before June 14, 1937.

(2) The Federal courts have jurisdiction of all crimes and offenses cognizable under the authority of the United States Judicial Code, Section 24, Paragraph 2, Title 28, U. S. C. A. Section 41. The defendant was indicted and convicted under Title 18, U. S. C. A. Section 338 (Criminal Code Section 215). Appeal to the Circuit Court of Appeals was taken in pursuance of the provisions of Title 28, U. S. C. A. Section 225 (Judicial Code Section 128).

(3) Application to the Court for writ of certiorari is made in pursuance of:

a. Title 28, U. S. C. A., Section 347 (Judicial Code Section 240, 43 Stats. 938).

b. Supreme Court Rule 38, Paragraph 5B.

III.

Regulations Involved.

Circuit Court Rules, Ninth Circuit, Rule 11. (In effect when the appeal herein was taken and perfected.)

IV.

Statement of the Case.

The facts material to the matter involved and the issues raised in the Circuit Court of Appeals have already been stated in the petition, in the "History of the Case," and "Statement of Facts Involved," pages 1-4, which are hereby adopted and made a part of this brief. Incidental facts will be developed in the argument.

V.

SPECIFICATIONS OF ERROR.

1. The Circuit Court of Appeals for the Ninth Circuit erred in refusing to pass upon, and thereby sanctioning, the "plain error" of the lower court in admitting in evidence Exhibit No. 75 (Assignment of Error XVI). Its decision therein (a), was in conflict with decisions of this Court and with its own decisions; and (b), violated petitioner's constitutional rights under the Fifth and Sixth Amendments to the Constitution of the United States.

2. The Circuit Court erred in refusing, on the stated ground of non-conformity to its then Rule 11, to consider assignments of error going to the admission by the trial court of hearsay evidence, which errors involved the very bases of the indictment.

VI.

ARGUMENT.

Prefatory Statement.

The Circuit Court of Appeals erred in refusing to consider, thereby sanctioning, the error of the trial court in admitting Exhibit 75. This trial error was one of substantive law, and not merely of evidentiary rule (Wigmore on Evidence, Vol. 1, 2nd ed., Sects. 2 and 3). As evidence, the lower court at first properly classified, and rejected, this Exhibit. In its ruling upon this exclusion, the court had properly declared it to be opinion evidence and a self-serving statement, no part of the transaction to which it referred, and after the event. Obviously, statements of this Exhibit charge the defendant in direct terms with fraud, and fraudulent representations. These matters of fraud were the basic issues on trial. The determination of these ultimate facts, extra judicially, was an invasion of the province of the jury. A more vulnerable document has but rarely obtained admission as "evidence" in a criminal trial. When it has, it has, heretofore, uniformly been held to be fatal error. We believe the error in this case subject to the principles announced in *Shepard v. United States,* 290 U. S. 96, 103, 78 L. ed. 196, and related cases. The Exhibit was a letter written by an eminent Seattle law firm to the defendant in argumentative and forceful phrases. It related the defendant to a business transaction between a client of the writer and a brokerage firm not the defendant's. In a context of vicious innuendo, the letter states: "The allegations and persuasions made by Pierce Lonergan * * * were obviously

fraudulently made and were made solely with the intent to get Mr. Atwood out of the market * * *" Also: "You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan * * * he will seek legal redress, if necessary, to recover his damages sustained by him by reason of such fraudulent misrepresentations" [R. 533-534]. These damning statements are the *factum probandum* of the case (Wigmore, *supra,* Sec. 2). They assert the "total fact" which was for the sole determination of the jury. The indictment charged the defendant with a scheme to defraud and to obtain money and property by false and fraudulent representations. The writer of this letter, a lawyer probably known to many of the jurors, was on the witness stand while the letter was read to the jury by the district attorney [R. 267-268]. The dramatic effect can easily be conceived as even greater than a denunciatory speech to the jury by the witness in person. Under no rule of evidence could this witness have been permitted to testify that the "persuasions" of the defendant "were obviously fraudulently made," and that his client "was defrauded by the misrepresentations" of the defendant. To permit the same result to be effected indirectly, was equal error, error so fundamental and vital as to violate petitioner's constitutional rights. Petitioner's efforts to have this Exhibit stricken or disregarded were denied [R. 267, 268]. And the situation was consistently aggravated by the admission of hearsay evidence, all of which errors the Circuit Court refused to consider, upon the assigned ground of non-conformity to its then Rule 11, although that position was not consistent with former decisions of the Court.

First Specification of Error.

A. The Admission of Exhibit 75 Was "Plain Error"

The Circuit Court, Eighth Circuit, in *Reineke v. United States*, 278 Fed. 724, involving the larceny of tires from a railroad car, reversed the judgment solely because of admission in evidence of a statement less prejudicial than the letter here. There it appeared that a witness was shown a paper which he said was the original bill of lading issued by a railroad company to a tire company for freight. The court stated, page 726:

> "We are of the opinion that no proper foundation was laid for receiving these papers as evidence * * * they are clearly hearsay, and we think prejudicial to the rights of the defendants * * * We find no other error in the record but on account of the error above mentioned, the judgment must be reversed."

In the case of *Harrison v. United States*, 200 Fed. 662, (C. C. A. 6), a mail fraud case, a letter from the assistant attorney general for the post office department written to the defendant was offered in evidence by the Government. The court says, page 673:

> "'Parts were excluded, however, but enough was received and read by the jury to make clear either by express statement or by inference that this official had decided the Easy Way Washer business to be a fraudulent rather than a legitimate business * * *'"

And further said, page 674:

> "Whether the business as evidenced by the circulars and advertising was legitimate or fraudulent was one of the issues for the jury; and obviously what the attorney general had decided or had said on that

> subject was primarily inadmissible * * * While we may concede that the letter was not wholly immaterial upon the subject of intent, it was at best remote in point of time and of uncertain effect in this respect. Whatever materiality it might have is subordinate to and merged in its more objectionable and injurious character as evidence. The minor bearing on intent would necessarily be inseparable from the major wrongful effect of the recited decision; and the limitations made and instructions given by the court as to the force which could be permitted to this letter, could not, we think, operate to prevent serious harm flowing from its reception to respondent's rightful interests."

In *Berry v. United States,* 15 Fed. (2d) 634, (C. C. A. 5), a mail fraud case, over objection of the accused, the court admitted in evidence a petition for the appointment of a receiver in the bankruptcy proceedings, which petition was prepared and filed by the creditors of the defendant. The petition stated the opinions of the creditors that there was danger of property being lost, destroyed, or otherwise disposed of. The court, in considering the admission of this written instrument in evidence, stated, page 635:

> "An allegation so made by creditors of one of the accused was not admissible as evidence against the accused to prove actual or intended improper conduct of the accused or either of them. The ruling in question was erroneous. The admission of that evidence was not kept from being prejudicial by the admission of competent and uncontroverted evidence requiring the conclusion that the accused had been or were engaged in hiding assets or fraudulently dis-

posing of them * * *" The court concluded, that "because of the above mentioned error, the judgment is reversed * * *"

In *Hart v. United States,* (C. C. A. 2) 240 Fed 911, a mail fraud case, the appellate decision is based upon a letter analogous to Exhibit 75 in the instant case; and its introduction was held to be grave error, page 917:

> "* * * the attorney for Anger Company wrote Hart a letter, in which he accused Hart of a considerable number of crimes and falsehoods, and threatened that he would lay the matter before the prosecutor of New York County * * *. On this trial, this attorney testified as to his talk with Hart, and the letter aforesaid was admitted in evidence against Hart, as 'a statement made to him.' The reason is a novelty, and the action amounted to permitting a reputable member of the bar, a man of vigorous personality, substantially to make a speech, stating his very low opinion of one or more of the defendants. There is no pretense that what was said in the letter could have been repeated *viva voce* by the witness to the jury; yet such was its practical effect when read to the jury, the writer sitting by in the witness chair. This was grave error."

The situation in that case was parallel to what is presented here.

From the foregoing, it is apparent that the error of the trial court in admitting Exhibit 75 was such error as justified reversal. But it was more; it was "plain error," and required reversal; and it required consideration to that end.

In a similar situation in relation to objectionable oral evidence, going again to the ground of the charge, this

Court held that evidence admitted without limitation, the admission of which is determined to be prejudicially erroneous, cannot be considered as admissible even for a limited purpose, where the risk of confusion is so great as to upset the balance of advantage. In *Shepard v. United States,* 290 U. S. 96, 78 L. ed. 196, this Court, speaking through Mr. Justice Cardoza, states at page 104 of the reported case: "Discrimination so subtle is a feat beyond the compass of ordinary minds. The reverberating clang of those accusatory words would drown all weaker sounds. It is for ordinary minds, and not for psycho-analysts, that our rules of evidence are framed. They have their source very often in consideration of administrative convenience, of practical expediency, and not in rules of logic. When the risk of confusion is so great as to upset the balance of advantage, the evidence goes out."

The Exhibit in the instant case declared in direct terms:

> "The allegations and persuasions made by Mr. Pierce Lonergan were obviously fraudulently made * * * You are further advised that Mr. A. M. Atwood was defrauded by the representations of Mr. Pierce Lonergan * * * he will seek legal redress, if necessary, to recover his damages sustained by reason of such fraudulent misrepresentations" [R. 533-534].

Particularly under the circumstances in which this Exhibit was presented to the jury, may it be said: "The reverberating clang of those accusatory words would drown all weaker sounds." An even more serious situation is indicated in the record.

The illegal purpose, gravely prejudicial to the defendant, for which this Exhibit was to be used, was apparent to the trial court and Government counsel, it would seem. When the Exhibit was first offered, to the objections interposed by the defendant the court added: "The additional one that it is a self-serving statement of an interested party, after the event, directed to the other person" [R. 264]. The court inspected the document [R. 263], and knew the grave charges of fraud and misrepresentation it contained. That the court knew and probably intended to indicate that the contents of the Exhibit would invade the province of the jury seems apparent from his statement to Government counsel that the Exhibit was "self-serving." After this ruling of the court, there followed the identification and admission in evidence of Exhibits 76-A and 76-B, then, "without further proof by way of identification," Government counsel re-offered the Exhibit. Defense counsel renewed previous objections, including the court's own previous objection, that the Exhibit was self-serving and the statement of third parties. To defense counsel's objection the court merely replied that the Exhibit 75 was responded to by one of the two Exhibits just admitted, without undertaking to indicate which [R. 267]. The whole matter was left at large, for the consideration and speculation of the jury. There was, in fact, no direct reference between the letters, and one of them, by its terms (Exhibit 76-B), could not refer to No. 75. Errors of this nature are those of substantive law. They are fatal because they permit the determinations of the ultimate issues and facts, (upon which the defendant is being tried), to be made and directly stated by someone other than the jury. Therein inheres the fatal nature of

the error. Therein lies the necessity of reversal on such account. And thereby results the compulsion upon an appellate court to notice the error, and give effect thereto.

Actions of the trial court which are clearly erroneous are presumptively prejudicial. They are, therefore, "plain error," and can be disregarded on appellate proceedings only when the entire record affirmatively establishes that they were not, in fact, prejudicial. *Fillippon v. Albion Vein Slate Co.,* 250 U. S. 76, 82, 63 L. ed. 853, 856; *United States v. River Rouge Imp. Co.,* 269 U. S. 411, 421, 70 L. ed. 339, 346; *Williams v. Great Southern Lumber Co.,* 277 U. S. 19, 25, 26, 72 L. ed. 761, 767. Although the first two of the above cases involved instructions, it is submitted that the underlying principle applies to other action taken by the court in the course of a trial, and particularly to matters of the admission of what is to go to the jury as evidence upon the issues submitted to them. If this is so in civil cases, it applies with greater force in criminal cases where life, liberty and reputation are at stake. *Crawford v. United States,* 212 U. S. 183, 194, 53 L. ed. 465, 470. That they are such "plain error," and therefore presumptively prejudicial and fatal to a defendant's rights, requires their notice and review by an appellate court, even though the errors involved may not have been saved and assigned in accordance with existing rules of court. *Brasfield v. United States,* 272 U. S. 448, 450, 71 L. ed. 345, 346; *Wiborg v. United States,* 163 U. S. 632, 657, 41 L. ed. 289, 298; *Clyatt v. United States,* 197 U. S. 207, 220, 49 L. ed. 726, 731; *Weems v. United States,* 217 U. S. 349, 362, 54 L. ed. 793, 796. It is submitted that the ruling of the Circuit Court is in conflict with the principles of all of the foregoing. And it is fur-

ther submitted that it is likewise in conflict with a parallel case in this same circuit, *Paddock v. United States,* 79 Fed. (2d) 872, 873-874, and with the cases of *United States v. White,* 77 Fed. (2d) 757, 758, and *United States v. Eide,* 88 Fed. (2d) 682, and cases cited.

The issue of fraud and fraudulent misrepresentations was sharply at issue in this case. The record discloses defendant took the stand and emphatically denied any intention to defraud or misrepresent or the doing of any of the fraudulent acts charged, and particularly, any operation or control of the four firms mentioned in the indictment [R. 386-446]. His good faith and sincerity were attested on the trial by leading Seattle bankers and officials [R. 332-341]. The Government's own witnesses testified to the defendant's sincerity and good purpose. [R. 142, 247]. To determine that the denunciatory charges in Exhibit 75 did not prejudicially affect the jury, it is submitted, is not possible from the record.

Still further extending and intensifying this situation was the error of the Circuit Court in refusing to consider the Assignments Nos. XXI [R. 573], XXXI [R. 581], and XXXII [R. 581], based on the hearsay evidence of McFaddin, McGrew and Romer, since thereby, the case in its entire aspect was, in effect, so conducted as to cause the harmful consequences of improper and incompetent evidence to permeate the whole record, and render the verdict wholly erroneous; and the decision in such regard is probably in conflict with the decision of this Court in *Waldron v. Waldron,* 156 U. S. 381, 384, 39 L. ed. 458, 459, and related cases.

B. The Admission of Exhibit 75 Violated Constitutional Rights

In view of the foregoing, it is submitted that it is apparent that the petitioner was deprived of the rights guaranteed, as against the federal government, by the Fifth and Sixth Amendments to the Constitution of the United States, to a fair and impartial trial, conducted according to the procedure established to govern the course of a criminal trial, and in particular the character of what shall be allowed by the trial court to go before the jury as evidence upon which they may ultimately determine the guilt or innocence of the accused upon the crime charged. The matter incorporated in Exhibit 75 was not evidence at all which had or could have, any proper place or function before the jury. It was in form and in fact a predetermined declaration, emanating from a third person, unsworn, foreclosing the very issues which the jury itself,—and no one else in a constitutional trial,—had been impanelled and sworn to hear, try, and determine. To admit it, and particularly in this case, in view of its great length as indicated by the record, and the state of the evidence as has just above been indicated, was to ignore all proper procedure, and insure the outcome of the case against the defendant. This trial was never fairly and impartially conducted, in this respect, according to any established procedure, probably conflicting with the decisions of this Court in *Shepard v. United States,* 290 U. S. 96, 103, 78 L. ed. 196, 201; *Brasfield v. United States,* 272 U. S. 448, 450, 71 L. ed. 345, 346; *New York Central Railroad Co. v. Johnson,* 279, U. S. 310, 318-319, 73 L. ed. 706, 710-711.

Second Specification of Error.

The Circuit Court erroneously applied its own former Rule 11.

The court refused consideration of a number of assigned errors, on the ground of non-conformity to its former Rule 11, in particular Nos. IX-XVIII, inclusive. That Rule was as follows:

> "The appellant shall file with the clerk of the court below, with his petition for appeal, an assignment of errors * * * When the error alleged is to the admission or to the rejection of evidence, the assignment of errors shall quote the full substance of the evidence admitted or rejected * * * errors not assigned according to this rule will be disregarded, but the court, at its option, may notice a plain error not assigned."

Among those above mentioned were Nos. XVI, XVII and XVIII, hereinabove discussed, copies of which appear as a Supplement hereto. [Assignment XVI, Supp. p. 30; Assignment XVII, Supp. p. 31; Assignment XVIII, Supp. p. 32.] Their form is therefore before the Court. The form of the others, namely, IX-XV, inclusive, and also XVI, was the same in each instance. It is submitted that, in each instance, these assignments are in substantial compliance with the requirement of the above quoted rule, and further, that they are in complete accord with the record actually made. These assignments challenged the admission, upon the grounds of lack of foundation and hearsay, of the several mailed documents which were the basis of the several counts upon which the petitioner was tried. In view of the state of the evidence which has already been indicated, it is submitted that it was error to refuse con-

sideration thereof on the ground of Rule 11. It is submitted that in so holding, the court brought itself in conflict with its own previous decision in *Meehan v. United States,* 70 Fed. (2d) 857, and that the decisions cited to support the action taken in the instant case, *Cody v. United States,* 73 Fed. (2d) 180, 184, and *Goldstein v. United States,* 73 Fed. (2d) 804, 806, themselves rest, and expressly declare that they rest, on *Meehan v. United States, supra.*

Petitioner has been charged and convicted on a felony. At all times on his trial, he enjoyed his constitutional right to the presumption of innocence. The burden was upon the Government which had charged him, to establish his guilt as laid, beyond a reasonable doubt. The length of the trial, and the state of the evidence resulting, has heretofore been noted. In refusing to consider the errors now in question, all most vital to the petitioner, the court only says:

> "We have examined it all and find that it amply warranted submission of the case to the jury" (page 594).

In a case involving a similar question, *United States v. Spaulding,* 273 U. S. 498, 499, 79 L. ed. 617, 622-623, a like declaration by the Circuit Court, page 657, did not serve to prevent this Court from subsequently reversing that case and holding: "* * * the evidence and all inferences that justifiably may be drawn from it do not constitute a sufficient basis for a verdict for respondent." That the Government was the petitioner there is, of

course, of no moment in respect to the principle and the practice.

For the foregoing reasons, it is earnestly and respectfully urged that the petition for writ of certiorari in this case be granted and the judgment of the Circuit Court of Appeals for the Ninth Circuit and the United States District Court for the Western District of Washington, Northern Division, be reversed.

Respectfully submitted,

PIERCE LONERGAN,
Petitioner in Pro Per.

Donald A. McDonald,
Carl B. Luckerath,
Empire Building, Seattle, Washington.

Oscar L. Willett,
Horace W. Danforth,
317 W. M. Garland Building, Los Angeles, California.
Of Counsel.

SUPPLEMENT.

Exhibits 75, 76-A and 76-B.

EXHIBIT No. 75

"August 17, 1934

Mr. Pierce Lonergan,
211 American Bank Building,
Seattle, Washington.

Dear Sir:

We are attorneys for Mr. A. M. Atwood who for approximately the last year and a half had been buying and selling silver on the Seattle Metal Exchange, through Louis Martin Company, silver brokers.

During the middle of July last. Mr. Atwood had on hand silver futures, as follows:

1,000 ounces September
2,000 ounces September
2,000 ounces March, 1935.

with a total credit margin of $324.93, in cash.

By reason of an alleged dumping of several hundred thousand ounces of silver on the Seattle market at approximately that time, the market was driven down each day to the maximum permitted under the law, with the result that on July 28th, Louis Martin Co., advised Mr. Atwood that an extra margin requirement was necessary to maintain his silver options and that it must be put up not later than Monday, July 30th, and failing to do so, would necessitate the selling of his silver options at the market.

After conferences with Mr. Pierce Lonergan and Mr. J. P. Walsh, Mr. Atwood deposited $400.00 in the Trust Department of the First National Bank, as an extra margin, conditioned upon the performance of your contract and by the delivery by you of 3,000 ounces of September option silver bullion .999 fine and 2,000 ounces of March option silver bullion .999 fine.

Mr. Atwood thus had covered the required margins. On Monday, August 6th, Mr. Atwood had a conference with Mr. Pierce Lonergan, wherein Mr. Lonergan informed Mr. Atwood that the Seattle Metal Exchange was broke; that Louis Martin Co. was broke and that there was an impending law suit involving about $150,000, which suit would tie up all the funds in Louis Martin Co. and the Seattle Metal Exchange and that Mr. Atwood had better hurry and get his $400 deposit back before these litigants tied it up and attached it, Mr. Lonergan at that time informing Mr. Atwood that the attorneys for such litigants were in conference, and that the suit would be started immediately. Accordingly, Mr. Atwood attempted to reach Mr. Walsh in order to secure a release of his deposit at the First National Bank and was unable to do so on that day.

On August 9th, however, Mr. Atwood reached Mr. Walsh, who made arrangements for Mr. Atwood to take back his $400.00 deposit in the First National Bank. Mr. Atwood took Mr. Walsh's letter authorizing the withdrawal of the $400.00 deposit and obtained such deposit.

Within an hour after Mr. Atwood had withdrawn his deposit and sold his silver options at Mr. Lonergan's and

Mr. Walsh's pleadings, the President proclaimed the nationalization of silver, at 50.01.

The allegations and persuasions made by Mr. Pierce Lonergan and Mr. J. P. Walsh to Mr. Atwood were obviously fraudulently made and were made solely with the intent to get Mr. Atwood out of the market in order to buy his silver at a low price in order that the same might be sold upon the nationalization of silver, which latter event Mr. Pierce Lonergan had been expecting for some time.

Reference is here made to Rem. Rev. Stat. of the State of Washington No. 2477, and as attorneys for Mr. A. M. Atwood, and pursuant to said statute, we herewith demand that the Seattle Metal Exchange and Louis Martin Company, or either, or both, furnish Mr. Atwood a written statement containing the names of the persons to whom his silver options were sold, the time when, the place where, the amount of, and the price at which the same was sold. You may comply with this demand by furnishing the same within 48 hours to the writer, at this office.

You are further advised that Mr. A. M. Atwood was defrauded by the misrepresentations of Mr. Pierce Lonergan and Mr. J. P. Walsh and that he will seek legal redress, if necessary, to recover his damages sustained by him by reason of such fraudulent misrepresentations.

Yours very truly,

BATTLE, HULBERT, HELSELL & BETTENS
By Joseph Gandy"

JEG:AC

EXHIBIT No. 76-A

"LOUIS MARTIN COMPANY
Bullion Brokers
American Bank Building
Seattle, Washington

Eliot
3055
Cable
Address
"Lomar"
Seattle

August 20, 1934

Battle, Hulbert & Helsell
10th Floor Exchange Building
Seattle, Washington
Attention: Mr. Joseph E. Gandy

Gentlemen:

Following is the information requested by you regarding the transactions for the account of Mr. A. M. Atwood on August 9, 1934.

OPTION	PRICE	AMOUNT	SOLD TO
6 Sept.	44c	$1320.00	Jordan Co.
4 March	44c	880.00	Jordan Co.

These transactions took place at Seattle, Washington. Any further information you may wish, please advise us.

Yours truly,

LOUIS MARTIN Co.
J. R. Walsh - (M.L.H.)"

JRW:MLH

EXHIBIT No. 76-B

"LOUIS MARTIN COMPANY
Bullion Brokers
American Bank Building
Seattle, Washington

Eliot
3055
Cable
Address
"Lomar"
Seattle

August 21, 1934

Mr. A. M. Atwood
c/o John Davis Co.
Seattle, Washington

Dear Sir:

Your communication of the 19th day of August, making certain statements through your attorneys regarding the manner in which your Silver contract account with Louis Martin Co. had been handled, has been received.

This is to advise you that upon your depositing with us the sum of two thousand two hundred and thirty-eight dollars & seventy-five cents ($2,238.75) representing ninety per cent (90%) of the contract price of the Silver contracted by you, your account will be reinstated for the amount of Silver and at the price contracted by you, provided, however, that you comply with the terms, conditions and provisions upon which you originally contracted the Silver and particularly the terms of your contract as evidenced by your signature card.

The deposit of $2,238.75 with us must be made by you on or before noon, Thursday, August 23, 1934.

Sincerely yours,
LOUIS MARTIN CO.
By J. R. Walsh (M.L.H.)"

ASSIGNMENT OF ERROR XVI

"The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 75, being a letter on the letterhead of Battle, Hulbert, Helsell & Bettens, as follows:"

(Exhibit No. 75 is here set out in *totidem verbis* as it appears at Page 25 of this Supplement.)

"The testimony in support of its admission given by witnesses, A. M. Atwood and Joseph Gandy, is substantially as follows:

A. M. Atwood testified that this is a letter from my attorney, Joseph Gandy, addressed to Pierce Lonergan. I saw it before it had been sent out of Mr. Gandy's office. It is a copy.

The witness, Joseph Gandy, testified,—that is a copy of a letter I wrote under date of August 17, addressed to Pierce Lonergan referring to the relationship and dealings between Mr. A. M. Atwood and the Louis Martin Company and the Seattle Metal Exchange. I was Mr. Atwood's attorney. I transmitted this to Pierce Lonergan and a copy to the Louis Martin Company under registered mail return receipts. I have the return receipts. Witness refers to the return receipt of Pierce Lonergan letter and the one for the Louis Martin Company letter.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was hearsay evidence, contained conclusions of third parties, and happened subsequent to the termination of the alleged plan.

2. It was a self serving statement of a third party making the statements therein contained.

3. It was incompetent, irrelevant and immaterial, and in its nature highly prejudicial to the defendant. Its admission was not necessary to clarify 76-A, and it was not related to 76-B."

Record Page 566.

ASSIGNMENT OF ERROR XVII

"The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 76-A, as follows:"

(Exhibit 76-A, is set out in *totidem verbis* as it appears at Page 28 of this Supplement.)

"The testimony in support of its admission given by the witness, Joseph Gandy, was in full substantially as follows:

This is the response that I received from the Louis Martin Company in reply to my letter of August 17, 1934. It was received through the United States mail by myself personally, and by my stenographer who handed it to me.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was not a part of the *res gestae* in this case.

2. It referred to a past transaction, and had no connection with the defendant, Lonergan. It was third party record."

Record Page 568.

ASSIGNMENT OF ERROR XVIII

"The Court erred in admitting in evidence, and denying defendant's motion to strike, to which exceptions were taken and allowed, plaintiff's Exhibit No. 76-B, as follows:"

(Exhibit 76-B, is set out in *totidem verbis* as it appears at Page 29, of this Supplement.)

"The testimony in support of its admission given by the witnesses, A. M. Atwood and Joseph Gandy, was in full substantially as follows:

A. M. Atwood testified, this is a letter dated August 21st from Louis Martin Company, signed by John R. Walsh, and addressed to me, in care of John Davis & Company, Seattle. The letter came to me personally. I received it through the mails. It is a reply to a letter from me of August 19, 1934.

Joseph Gandy testified, the letter of August 17, 1934, was the only letter addressed at any time to Mr. Lonergan or Louis Martin Company.

The reasons such Exhibit should not have been admitted, and that it should have been stricken, are as follows:

1. It was not a part of the *res gestae* in this case.

2. It referred to a past transaction, and had no connection with the defendant, Lonergan. It was a third party record.

3. It was not in response to any letter admitted in evidence, and particularly not in response to Exhibit No. 75."

Record Page 570.